United States Court of Appeals

for the Second Circuit



APPELLANT'S REPLY BRIEF

76-7476

and the following related appeals:

76-7486 76-7488 76-7489 76-7494 76-7495 76-7499 76-7500

ORIGINAL WITH PROOF OF SERVICE

To be argued by
PHILIP MANDEL

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/S

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant-Cross-Appellee,

-against-

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees-Cross-Appellants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN and ROBERT L. STERN as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, SANFORD ROGGENBURG, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman),

Additional Defendants on Counterclaims-Appellants-Cross-Appellees,

LAWRENCE J. BERKOWITZ,

Additional Defendant on Counterclaims-Cross-Appellee.

UNITED STATES COURT OF APPEALS
FILED
APR 29 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Appeal from a Judgment of the United States District Court for the Southern District of New York

REPLY BRIEF ON CROSS APPEAL OF DEFENDANTS--APPELLEES--CROSS-APPELLANTS CHARLES GROSS, MABEL BLEICH, GROSS & CO., AND JEANNE DONOGHUE

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UNITED STATES COURT OF APPEALS
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ROBERT L. NEWBURGER, RICHARD D. STERN,
WALTER D. STERN and ROBERT L. STERN
as Executors of the Estate of Leo Stern,
ROBERT L. STERN, RICHARD D. STERN,
SANFORD ROGGENBURG, FRED KAYNE, ROBERT
MUH, PAUL RISHER, CHARLES SLOANE,
ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER,
HEINE, UNDERBERG & GRUTMAN, a Partnership
(formerly known as Finley, Kumble,
Underberg, Persky & Roth and Finley,
Kumble, Heine, Underberg & Grutman),

Additional Defendants on
Counterclaims-Appellants-
Cross-Appellees,

LAWRENCE J. BERKOWITZ,

Additional Defendant on
Counterclaims-Cross-Appellee.

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REPLY BRIEF OF DEFENDANTS--APPELLEES--CROSS-APPELLANTS

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PRELIMINARY STATEMENT

This is a reply with regard to the cross-appeal. The gravamen of the cross-appeal is that the findings of fact made by the Trial Court require a conclusion, as a matter of law, that Mr. Gross is entitled to damages by reason of the destruction of his employment as a trader with Rafkind & Co. The Trial Court concluded that the destruction of this employment was justified by an anti-competitive provision in the Partnership Agreement (E438) although the destruction was motivated solely by a desire to "club" Gross and was not related to legitimate protection of the business of the partnership (P521).

The amended answer sets forth the wrongful destruction of the Rafkind employment in three different counterclaims. The Fourth Counterclaim alleges the general conspiracy in breach of fiduciary duties, pursuant to which the conspirators performed various acts, including the destruction of Gross' employment with Rafkind (P47). The Eighth Counterclaim sounds in State law (P50-51). The Ninth Counterclaim (P51-52) pleads the same facts as a violation of the Sherman and Clayton Acts.

The answer also states that the Court has pendent and ancillary jurisdiction of all counterclaims set forth in the answer,although the Ninth Counterclaim obviously rests upon its own statutory base (P32). The relationship of the Ninth Counterclaim, alleging Sherman and Clayton Act violations, to the other counterclaims embracing the same facts

is discussed in our Point III below on the question of jurisdiction.

It should be noted that Judge Owen granted judgment to Mr. Gross on the Fourth Counterclaim which alleged a conspiracy to injure Gross, Bleich and Donoghue in breach of fiduciary duties. Although Judge Owen found that the Rafkind employment was destroyed in order to further the conspiratorial scheme, he did not award damages with regard to this element of the counterclaim, holding that, regardless of motive, the conspirators' acts were justified by the contractual provision.

If we are right that the restrictive covenant was unlawful, then damages should be awarded under one or another of the counterclaims. If the Court holds that the restraint was in violation of U. S. Antitrust Laws, it follows that triple damages and attorneys' fees should be awarded. Since the wrong was committed pursuant to the conspiracy found in connection with the Fourth Counterclaim, all of the conspirators should be held liable under the Fourth Counterclaim for whatever measure of damages is appropriate.

POINT I

FINLEY, KUMBLE'S ARGUMENTS OPPOSING THE CROSS APPEAL ARE BASED ON FACTS AT VARIANCE WITH THE FINDINGS

The findings made by the Trial Court establish, as a matter of law, that Gross is entitled to damages for the wrongful destruction by the conspirators of his employment as a trader by Rafkind & Co. As a trader, Gross would be buying and selling stocks utilizing the funds of Rafkind

& Co. Profits were to be shared, under a formula, by Rafkind and Gross. The heart of the matter is that as a trader Gross would in no way be competing with Newburger, Loeb & Co., nor would his activities affect the business of Newburger, Loeb & Co. in any way. For this reason the restraint against Mr. Gross' employment by Rafkind was not reasonably necessary for the protection of the partnership business, and was accordingly unlawful under all of the authorities cited in pages 122 through 125 of our main brief, including the leading case of United States v. Addyston Pipe Steel Co., 85 F. 271 (6th Cir. 1898) modified and aff'd 175 U.S. 211.

The Finley, Kumble answering brief seeks to evade the force of these authorities by giving the impression that Gross was not to be employed as a trader, but rather as a customer's man soliciting commission orders from former customers of Newburger, Loeb & Co. ". . . in competition with the partnership". (Finley, Kumble answering brief p. 51).

This argument flies in the face of the Trial Court's findings that (1) Gross was to be employed by Rafkind & Co. as a trader, and (2) that there was no economic justification for the conspirators' destruction of his employment. The applicable portion of Judge Owen's opinion is completely inconsistent with the factual allegations of Finley, Kumble's argument:

> "Further, Gross having withdrawn as general partner, and having no source of income, was looking for new employment and had an opportunity to become a trader with the firm of Rafkind & Co. Trading was an area in which Gross was known by all to be very experienced. While there was a

non-competition clause which the new team had the legal right to assert, there was no economic justification for so doing other than using this as a further club against Gross. This is what the new team did. It was suggested to Gross that if he went along with them, they would free him to engage in trading activities with Rafkind. He did not and they did not." (P521).

Finley Kumble's present pretense that Mr. Gross was to be employed to solicit customer business in competition with Newburger, Loeb & Co. is destroyed by the following portion of the cross examination of Mr. Rafkind conducted by Mr. Grutman:*

"Q You say that Mr. Gross has been known to you for 17 years and that you regarded him as the second best trader in Wall Street, modestly regarding yourself as the first best?

A Yes.

Q And would it not be reasonable to say that if in fact the No. 1 and No. 2 traders were at one firm, the presence of the second best joining the best would be an asset to your firm?

A Absolutely.

Q And would attract business to your firm?

A No, sir.

Q When somebody is at a firm, some registered representatives have a reputation for sagacity in trading --

A We were not --

Q Wait. I didn't finish. Just wait until I finish my question.

A All right.

Q Don't traders in Wall Street have what is known as a following?

A No, sir.

*Mr. Grutman was the head of Finley, Kumble's litigation department who conducted the trial of this matter on behalf of his own law firm.

Q Not at all?

A I don't have one.

Q Is your testimony that the presence of Mr. Gross at your company would in no way have influenced anybody to come and do business with your company?

A In my opinion no." (A2276-A2277)

The letters (E852-855) between Rafkind & Co. and Newburger, Loeb & Co. concerning Gross' prospective employment, and the telephone calls in which Rafkind & Co. was threatened with lawsuits and stock exchange procedures if they employed Gross (A2270-2272), took place between January 19, and February 1, 1971. At that time the Newburger, Loeb business was being run by Risher and Muh, members of the New Team, who hoped for very large profits if the proposed sale of the partnership business to their corporation could be pushed through. Muh authorized Lawrence Berkowitz to write the letters which were sent to Rafkind & Co. in the name of Newburger, Loeb & Co., and Muh testified that he believed Mr. Risher was consulted and that he approved (A3359).

Risher, who was caught out in misstatements again and again during the course of the trial, testified that he did not remember whether he was involved in the discussions concerning Gross' employment by Rafkind (A2842-2843), but his guilty knowledge was clearly established by statements made by him at a large meeting held on February 5, 1971, three or four days after the last letter was mailed to Rafkind & Co. The February 5 meeting was held for the purpose of seeing whether some accommodation could be negotiated between Mr. Gross and the opposing factions. Among others, the meeting was

attended by Risher, Muh and Persky representing the New Team, by Robert Newburger and Mr. Burak representing the General Partners,by Ned Frank, by Arthur Silverman representing Bleich and Donoghue, and by Mr. Gross' attorney, Philip Mandel. During the course of the meeting Mr. Mandel said that it was essential for Mr. Gross to get a substantial sum of cash so that he could carry on his buisness as a trader. Mr. Risher answered that it was not necessary for Mr. Gross to have cash, because if he reached an accommodation with the others he would be permitted to have his employment as a trader with Rafkind & Co. This was established by the testimony of Mr. Silverman (A1745-1748),which was supported by Mr. Silverman's notes made during the course of the meeting (E734-735).

Risher's attempted effort to avoid the impact of this evidence was illogical and incredible. He testified that he believed that Gross was actually being employed by Rafkind as a trader, and that the thrust of his remarks was only that since Gross had such trading employment without capital there was no necessity for him to get cash in any arrangement he worked out to go along with the proposed deal. Risher testified as follows in response to questions by his own counsel:

> Q Can you tell the Court what you said on February 5th with respect to Rafkind?
>
> A Yes. As I recall it, Mr. Mandel had indicated in this meeting that Mr. Gross needed and wanted cash so he could trade. At that point in time I thought Mr. Gross was going to work for Rafkind and Company and I made a comment which is noted here, that Mr. Gross is trading with Rafkind. . ." (A2864).

Risher's statement that he thought Gross was being

employed by Rafkind was obviously a desperate improvisation designed to vary the meaning of his words as noted contemporaneously. Right at the start of the meeting -- according to Risher's own testimony -- Mr. Steefel stated that if Gross accepted the proposed deal he could work on Wall Street, but if Gross did not accept the deal he would only have lawsuits, and would not be able to work, and would be in bad shape (A2841). Having heard these statements of Steefel, how could Risher have thought Gross was working for Rafkind? Having heard Mr. Mandel say Gross' employment with Rafkind had been destroyed, (A3023) how could Risher have believed Gross was being employed by Rafkind and therefore did not need capital? Finally, it is not possible to believe that Risher could have twice stated to the meeting that Gross was presently being employed by Rafkind without having been corrected either time by Mr. Mandel or Mr. Frank or Mr. Muh or Mr. Silverman or any other people at the meeting who knew all too well that the proposed employment had been destroyed.

In arguing that Mr. Risher's version of his remarks at the February 15 meeting was incredible we go further than we need. The Trial Court heard the testimony and saw the exhibits, and reached a finding that the conspirators destroyed Gross' employment as a trader in order to "club"him.

The key fact is that in the course of his denial* that he intended to destroy Gross' employment, Risher established that the conspirators knew full well that Gross was to be

*The denial was rejected by Judge Owen's findings.

employed as a trader by Rafkind, and not as a customer's man.

Muh tried to evade responsibility for his role in the destruction of the Rafkind employment by taking another tack. He admitted that he knew the Gross employment by Rafkind would not in any way affect the business of the partnership or of the corporation:

> "Q. Did you feel on that day when you approved quadruple B, that Mr. Gross' employment by Rafkind in any capacity could injure the prosperity or well being of the partnership or of the corporation?
>
> A I had no reason to believe that.
>
> Q As far as you were concerned, whatever Gross did after (sic) Rafkind, it wouldn't make any economic difference to the partnership or the corporation?
>
> A That is correct." (A3364)

Muh testified that he did not intend to interfere with the proposed employment of Gross by Rafkind. Muh said that the purpose of the letters to Rafkind & Co. was only to give Rafkind relevant information. He felt that there was an obligation ". . . to inform them of all the facts as we knew them". (A4893).

Certainly the Trial Court was justified in rejecting this preposterous claim, especially in view of Mr. Rafkind's testimony that litigation was threatened if Rafkind proceeded with Gross' employment (A2272-2274; A2289-2290).

Finley, Kumble's answering brief seeks to disassociate Persky from involvement in the destruction of the Rafkind employment, stating (Finley, Kumble answering brief p.51):

> "Nowhere in the Gross brief's statement of facts on this issue is there any hint that Persky

> or Finley, Kumble played any role whatsoever in this matter. Nor did the District Court make any such finding. The Court found only the "New Team" responsible for the assertion of the covenant, and the New Team was never defined to include Persky or Finley, Kumble (517; 521)."

First, since the Court found the destruction of the Rafkind employment was perpetrated as part of the conspiracy set forth in the Fourth Counterclaim, all of the conspirators are liable for this facet of the conspiracy. Since Persky was one of the leading conspirators, as the Court found (P532, 525, 527), along with Risher, Kayne & Muh, Persky and his law firm are liable for the damage caused to Gross by the destruction of his employment, even if it were assumed that no evidence connects Persky directly with this wrongdoing.

However, we cannot allow an erroneous impression to be created that the record contains no evidence connecting Persky with the Rafkind matter. Actually such evidence against Persky emerged at the trial in a somewhat interesting way. No copy of any of the correspondence between Newburger, Loeb & Co. and Rafkind & Co. was produced by Finley, Kumble upon discovery. The copies of these letters marked during depositions, (E853) and (E855), did not show that carbon copies of them had been sent to Mr. Persky. However, during the course of the trial we noticed that Mr. Grutman, Finley, Kumble's trial counsel, was using a copy of one of these letters bearing the notation: "cc: Robert Persky". We then offered Mr. Grutman's copy in evidence. Mr. Grutman protested that the document was idential to an exhibit which had already been received. The Court perceived the difference --

the note at the bottom showing that a carbon wen to Persky -- and accepted the paper in evidence directing that it be marked FK Ex.Y (A2273-74).

Furthermore, Persky was undeniably present during the meeting of February 5,1971 (which occurred just a few days after the mailing to him of a copy of Berkowitz' last letter to Rafkind & Co.), when Risher said that Gross would be allowed to have his employment with Rafkind if he went along with the proposed Transfer Agreement. Persky said nothing to disavow either the fact of destruction or the purpose behind it. Indeed, the damage worked upon Gross by this aspect of the conspiracy can only be regarded as a fulfillment of the threats which Persky repeatedly made with regard to the consequence of Gross' persistence in refusing to go along with the Transfer Agreement (P534).

We think it is further noteworthy that no testimony of Mr. Persky was ever proffered at the trial to deny his participation in the destruction of Gross' employment with Rafkind, or to deny his knowledge of the acts performed by the conspirators and the purpose of such acts.

Thus there was ample circumstantial and direct evidence to connect Persky with this aspect of the conspiracy. Indeed, the quantum of such evidence is surprising, for one would not ordinarily expect to find behind-the-scene evidence of communications between the conspirators in which they informed each other of the steps taken by each pursuant to the common plan. As we have pointed out, no such evidence is needed to make each conspirator liable for every facet of

the conspiracy. Every person who participates in the conspiracy, in any of its aspects, is liable for the whole.

POINT II

THE NINTH COUNTERCLAIM STATES A VALID CLAIM UNDER FEDERAL ANTITRUST LAW.

A. Federal Antitrust Laws Apply to Covenants Restricting Employment

It is a wonder to us that the attorneys for Finley, Kumble have chosen to state to this Court, in permanent black and white, that our arguments concerning federal antitrust law are frivolous.

As we have shown in our main brief, two distinguished law professors, writing in the Harvard and Columbia Law Reviews,* are strongly of the opinion that the antitrust laws apply to covenants restricting employment. Indeed, Professor Goldschmid states that it seems frivolous to question such application.** The plain language of the Sherman Act does not carve out covenants restricting employment as an exception to the general prohibition against contracts, combinations or conspiracies restricting trade. The landmark case of U.S. v. Addyston Pipe Steel Co., supra, includes covenants restricting employment in its discussion of the illegality of unreasonable restrictive covenants under the Sherman Act. Further, the following decisions discussed in our main brief (pp. 129-130) are based in whole or in part upon the assumption that un-

*Blake, Employee Agreements Not to Compete, 73 Harv. L.Rev. 869 (1960) and Goldschmid, Antitrust's Neglected Stepchild: A Proposal For Dealing With Restrictive Covenants Under Federal Law, 73 Colum. L.Rev. 1193 (1973).

** See our main brief, p. 126.

reasonable restrictions against employment are violative of the Sherman Act: Lektro-Vend Corp. v. Vendo Corp., 403 F. Supp. 527 (N.D. Ill. 1975), aff'd 545 F.2d 1050 (7th Cir. 1976), Cert. granted 50 L.Ed.2d 74; Nichols v. Spencer International Press, Inc., 371 F.2d 332 (7th Cir. 1967); Bowen v. Wohl Shoe Company, 389 F. Supp. 572 (S.D. Tex. 1975); Alders v. AFA Corporation of Florida, 353 F. Supp. 654 (S.D. Fla. 1973), aff'd 490 F.2d 990 (5th Cir. 1975); Frackowiak v. Farmers Ins. Co., 411 F. Supp. 1309 (D.C. Kans. 1976).

We have also shown in our main brief that federal law, in general, has recognized protection of the right to free employment as an important value of our society, and in particular, that the antitrust laws have frequently been applied by the Courts to condemn, as illegal, restraints against free employment arising in contexts other than the restrictive covenant (main brief 127-128).

Against this weight of authority and reason Finley, Kumble offers nothing in opposition except some language from the Bradford decision. As shown in our main brief, the Bradford decision actually turns upon a holding that covenants restricting employment are not violative per se of the Sherman Act, and that the covenant there being considered was reasonable.

Thus, this Court never reached in Bradford the issue here presented: is an unreasonable contract in restraint of employment a violation of federal antitrust law? We respect-

fully suggest that the posture of the instant case gives this Court an opportunity to answer the question not reached in Bradford, and, perhaps, to clarify the Bradford decison. We suggest this may be especially appropriate since we believe that the Courts of Appeals for the 5th Circuit (Golden v. Kentile Floors, Inc., 512 F.2d 838 (5th Cir. 1974)) and the 7th Circuit (Nichols v. Spencer International Press, Inc., supra, and Lektro-Vend Corp. v. Vendo Corp., supra) have indicated an opinion that agreements unreasonably restricting employment violate the federal antitrust laws.

B. Reliance on an argument that there was no anti-competitive purpose in the destruction of Gross' employment is misguided.

The conspirators' purpose was to restrain Gross' right to engage in business as a trader, and this purpose, as Judge Owen found, they achieved. They achieved this purpose through the use of an agreement which was unlawful under the Sherman and Clayton Acts. All of the cases cited in our main brief relating to employee's covenants, and covenants of former partners, are exactly in line with Gross' claim, and, as we have shown, the cases examined the reasonableness of the restraint in order to determine whether there was a violation of the antitrust laws.

It is well settled that the only intent required to prove a violation of the antitrust laws is the intent to perform the acts constituting the unreasonable restraint. The law presumes that the wrongdoers intend the consequences of their acts: United States v. Patten, 226 U.S. 525 (1913).

It is no defense against unreasonable restraint of trade that the motives of the participants are good: United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310 (1956); Ring v. Spina 148 F.2d 647,651 (2d Cir. 1954), cert. denied 335 U.S. 813. Nor is an unreasonable restraint of trade saved from violation of the antitrust laws by the fact that it is motivated by the desire to exclude dishonest merchants from access to the commodity, or that its effect is actually to increase competition: United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387, 396 (S.D.N.Y. 1942) modified on other grounds 321 U.S.707.

The three cases cited on page 55 of the Finley, Kumble answering brief are all out of point.

In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 97 S.Ct. 690 (1977), the Supreme Court held that Brunswick's operation of bowling alleys which had defaulted on mortgages held by Brunswick did not fall afoul of the statutory anti-merger provisions of the Clayton Act. The relevant question in the Brunswick case, as stated by the Supreme Court at 50 L.Ed.2d 709, was:

> "Petitioner questions only whether antitrust damages are available where the sole injury alleged is that competitors were continued in business,thereby denying respondents an anticipated increase in marketing shares." (footnote omitted)

We think it apparent that neither the narrow question presented, nor the Supreme Court's answer to it in Brunswick, has any application in the instant case.

Times Picayune Publishing Co. v.United States,

345 U.S. 594 (1953) is likewise completely out of point. That case tested the legality of tying arrangements under the anti-trust laws. The Court held that the tying arrangement was not unreasonable under the circumstances of the case and therefore was not unlawful. The key language quoted below, appearing at 345 U.S. 614, weighs heavily against the conspirators in the instant case:

> "Since the requisite intent is inferred whenever unlawful effects are found, United States v. Griffith, 1948, 334 U.S. 100, 105, 108, 68 S.Ct. 941, 944, 946, 92 L.Ed. 1236; United States v. Patten, 1913, 226 U.S. 525, 543, 33, S.Ct. 141, 145, 57 L.Ed. 333, and the rule of International Salt is out of the way, the contracts may yet be banned by §1 if unreasonable restraint was either their object or effect."

In the instant case the restraint was unreasonable under the test laid down in Addyston, and since both the intent and the effect were present, the acts of the conspirators clearly violate the anti-trust laws.

GAF Corp. v. Circle Floor Co., 463 F.2d 752 (2d Cir. 1972), cert. dismissed 413 U.S. 901 (1973), is also entirely out of point. The action, as the Court recognized, was brought as a step in a takeover contest. Plaintiff GAF alleged that Circle Floor sought control of GAF in order to prevent GAF from continuing to act as a supplier to Circle's competitors. In other words, GAF charged vertical integration with an intent to monopolize. The Court held that the antitrust injury alleged was aimed at Circle's competitors and not at plaintiff (a supplier), and that plaintiff, therefore, was not within the scope of those protected by the Act.

The heart of the Court's ruling is set forth in the following quotation:

> "GAF is in effect contending that because appellees' alleged activities threatened the competitive position of others, it can maintain a suit under §4 of the Clayton Act, 15 U.S.C. §15 (1970), merely by alleging some loss. But this is not the law." (463 F.2d 752).

This decision can give no comfort to the conspirators in the instant case, for Gross was the direct target of the illegal acts: it was intended that his employment should be destroyed, and his employment was in fact destroyed. Unlike the GAF case, Gross was not merely an indirect victim of an injury intended to be inflicted upon another.

We respectfully suggest that the foregoing cases, concerning monopoly, have no application to the situation of agreements or combinations restricting the rights of employment. See Radovich v. National Football League, 352 U.S. 445 (1975).

Put another way, Finley,Kumble claims that they are exculpated from the legal consequences attendant upon an unlawful restraint of trade because their motive was not to injure a competitor, but merely to work a malicious injury on Gross personally. This argument confuses motive with intention. The presence of malicious persnal motive has never been held a defense to an unlawful restraint under the anti-trust laws, nor should it be.

C. Duration and Geographical Limit.

Nor is there any merit to the Finley, Kumble suggestion that the reasonableness of a restrictive covenant must be tested only by reference to duration and geographical

area (Finley, Kumble answering brief, p. 53). Every aspect of the restriction must meet the test of reasonableness.

The decision in United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898) modified and affirmed 176 U.S. 211, does not limit reasonableness to the elements of time and geography, but rather defines the test of reasonableness in all-embracing terms; see the quotation from Addyston set forth on pages 123 and 124 of our main brief. It is apparent that to define the scope of prohibited employment in an overbroad manner -- as was done in the instant case when Gross was prevented from working as a trader -- is just as repugnant to the requirement of reason as an overbroad limitation of geographical area or duration. Thus to restrain a baker from engaging in any aspect of the food industry would be unjustifiable under the Addyston test, because unnecessary for the legitimate protection of the interests of the employer.

The Restatement of Contracts, §515, defines an unreasonable restraint of trade as one which is "greater than is required for the protection of the person for whose benefit the restraint is imposed". Examples 1 and 4 set forth in the Restatement involve restraints which are unreasonable because the activity restricted is too extensive:

> "1. A sells his grocery business to B, and as part of the bargain promises not to engage in business of any kind within the city. The restraint is more extensive than is necessary for B's protection and the promise is illegal." (Emphasis added)
>
> * * * * *
>
> "4. A employs B for five years as manager of a cotton mill. As part of the bargain B promises not to become a manager of a mill of any kind in the city where he is employed by A for three years after the

termination of the employment. The restraint is more extensive than is necessary to protect A, and the promise is illegal." (Emphasis added)

Professor Blake, in Employee Agreements Not to Compete, 73 Harv. L.Rev. 625, 675 (1960), speaks of "activity restraint"

"The traditional dimensions of a restraint have been those of duration and geographic area. The 'activity' dimension was not an issue in the earliest cases; a trade was a trade, set apart by separate guilds and the institution of apprenticeship, and there was no ambiguity in a promise not to 'exercise the trade of a baker' or 'enter into competition.' But division of labor and specialization now make it of the utmost importance that a restraint define carefully the actvities in which the employee is not to engage. Thus, in the modern cases the 'time' dimension remains critical, but the 'activity' restraint is, in many cases, replacing the 'area' restraint."

In Hydraulic Press Mfg. Co. v. Lake Erie Engineering Corp., 132 F.2d 403 (2d Cir. 1942), this Court struck down, under state law, a restrictive covenant in which a draftsman was forbidden to work for a competing company, although reasonable in time and space, on the ground that the draftsman's activities could not impinge upon the reasonable interests of the former employer, saying:

"In general no private employment contract which curtails that right will be enforced in a court of equity unless the rights of the employer reasonably need such protection. Super Maid Cook-Ware Corporation v. Hamil, 5 Cir., 50 F.2d 830. In this instance it is obvious that they do not. Illing was in possession, of course, of such knowledge of the plaintiff's business as was necessary to enable him to work as a draftsman and do what designing was required on orders submitted to him, but he had none of the plaintiff's trade secrets to disclose to any competitor or to anyone else. His situation is not to be confused with that of a salesman whose acquaintance and personal relationships with customers of the plaintiff might enable him to divert their trade unfairly to a competitor." (132 F.2d 403,404)

D. Terms of Agreement.

Finley, Kumble asserts that the test of legality lies in the provisions of the contract rather than the particular application made of them (See Finley, Kumble answering brief, pp. 54 and 55). This argument does not help their case, for the provisions set forth in the contract are clearly unreasonable in terms of geographical area. The restrictive covenant in the partnership agreement (E438) prohibits the former partner from engaging in the business of broker or dealer in securities or commodities without geographical limitation. Since Newburger, Loeb & Co. had offices only in New York City and California (E555), this overbroad geographical restraint would clearly make the agreement unlawful as written.

However, we believe that the law looks to the actual situation of the parties before the court, and not merely to the words of the challenged covenant.* For that reason we have based our argument on the fact that Gross' proposed activity, trading, was not competitive with Newburger, Loeb & Co., and therefore restraint of such employment was unreasonable and, accordingly, unlawful.

E. Period of Damages.

Further, there is no merit to Finley, Kumble's argument that Gross' damages should be limited to the period of time during which the covenant applied by its terms (Finley, Kumble answering brief, p. 51). It is true that the restrictive covenant expired by its terms on December 31, 1971,

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*See Blake, Employee Agreements Not to Compete, supra, p. 674,675

a little less than one year after the date on which Rafkind first proposed to employ Gross. However, it does not follow from this that Gross' injury was limited to this period. The measure of damages under the antitrust laws is the actual harm done, and we believe that it is common knowledge that a man who is blocked from taking a job during the next year may lose employment which may last for 2 years, 3 years or even longer. Time and tide and employment do not always wait for one who is not available promptly. The Rafkind employment was to be for an indefinite duration, and the trier of fact must determine, from all of the circumstances, how long such employment would have lasted had the conspirators not unlawfully aborted it.

In any event, it is apparent that this particular argument advanced by Finley, Kumble goes only to the quantum of damages,and is not in any way related to the question of a valid cause of action. Finley, Kumble's argument, given its furthest impact, would merely indicate that Gross' recovery should be limited to the damages suffered during an 11-1/2 month period, multiplied by 3.

POINT III

THERE IS NO MERIT TO THE CLAIM THAT FEDERAL JURSDICTION IS LACKING OVER THE CLAIM FOR DESTRUCTION OF EMPLOYMENT

The answer pleads the destruction of employment in three different counterclaims. In the Ninth Counterclaim it is pleaded as a violation of Federal antitrust law. In

the Fourth Counterclaim it is pleaded as a facet of the overall conspiracy to injure defendants in violation of fiduciary duties. In the Eighth Counterclaim it is pleaded separately as wrongful under State antitrust law and other state laws.

If this Court agrees with us that the Federal antitrust laws apply to the destruction of Gross' employment with Rafkind, then the jurisdictional inquiry, of course, is answered at once. However, if the Court should decide that Federal antitrust law does not cover restrictive covenants affecting employment, then the Court must decide whether there is any merit to our adversaries' arguments that no ancillary or pendent jurisdiction exists over the same facts set forth as a claim of violation of State law in the Fourth and Eighth Counterclaims.

A. Ancillary jurisdiction exists over the claim for destruction of employment as a facet of the conspiracy found by Judge Owen.

Our adversaries' jurisdictional arguments overlook the fact that the Fourth Counterclaim alleges that the destruction of Gross' employment with Rafkind is one facet of the overall conspiracy set forth in that Counterclaim. They also overlook that Judge Owen found (1) that such a conspiracy was carried out,and (2) that the conspirators destroyed the Rafkind employment as a coercive step as one facet of the Fourth Counterclaim. Judge Owen denied recovery only because he thought the restrictive covenant was valid and that the conspirators had "... legal right to assert it" (P521).

From this we believe it necessarily follows that ancillary jurisdiction exists over this aspect of the conspiracy along with all other portions of the Fourth Counterclaim. If the restrictive covenant is invalid for any reason, or if its use to block the Rafkind employment was wrongful on any basis, damages must be awarded on this aspect of the conspiracy, in addition to the damages awarded on all other aspects of the conspiracy.

Thus our adversaries' argument that no jurisdiction exists as to the Rafkind matter necessarily stands or falls with their broader argument that no jurisdiction exists with regard to any of the counterclaims except the Ninth*. In this position the adversaries challenge the decision made by Judge Ward** upholding ancillary jurisdiction over the First, Second and Fourth Counterclaims, and further challenge the same conclusion reached by Judge Owen in granting judgment on these counterclaims after trial.

As we show in our main brief, the counterclaims, and most particularly the Fourth Counterclaim, fully satisfy the jurisdictional standards set forth in Moore v. New York Cotton Exchange, 270 U.S. 593 (1926), Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631 (3d Cir. 1961), and United States ex rel D'Agostino Excavators,Inc. v. Heyward Robinson Co., 430 F.2d 1077 (2d Cir. 1970). These leading cases hold that there is ancillary jurisdiction if there

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* The federal antitrust claim

** 365 F. Supp. 1364; P444, 448

exists a "logical relationship" or some factual or legal linkage between the complaint and the counterclaims. We suggest that such linkages and logical realtionships exist overwhelmingly in the instant case.

In their original brief (p. 24) Finley, Kumble made the unsupportable statement that:

> "The issues of fact and law raised by the complaint and the counterclaims are entirely different ...."

In the reply brief,they de-emphasized this position, having been confronted with a demonstration that there were numerous vital overlapping issues of fact and law (our main brief, pp. 90-94). We showed the following linkages of fact and law, among others,between the complaint and counterclaims, all of which were recognized as common issues by Judges Ward and Owen: (1) the issues pertaining to the legality and validity of the successive assignments of Buckley's churning claim. These involved questions of estoppel, fiduciary duty, good faith, and the impact of Partnership Law §98 upon the validity of the Transfer Agreement under which the assignment of the churning claim was made to plaintiff; (2) the factual and legal issues pertaining to whether the settlement with Buckley, under which plaintiff's claim was created, was made dishonestly as part of the conspiracy alleged in the counterclaims; (3) the fact that plaintiff's entire action was brought dishonestly as part of a conspiracy in breach of fiduciary duties. These issues, without question, link the complaint and counterclaims.

As we showed in our main brief, the complaint alleges, as vital elements of plaintiff's cause of action,

that Buckley assigned the churning claim to the partnership, and that the partnership in turn assigned it to the corporate plaintiff. The Finley, Kumble Answering and Reply Brief (p. 6) seeks to slide over the significance of these assignments by saying that plaintiff's allegation of assignment was "a ritualistic, one-sentence reference"; that it was "totally peripheral"; that the assignment was "not the subject matter of the claim"; by saying that the assignment was a "tangential link". These are all hollow words.

The assignment of the churning claim by Buckley to the partnership, and the reassignment of the claim by the partnership to the corporate plaintiff, were both necessary allegations of the complaint, and facts relating to the validity and good faith of these assignments are nuclear links to the conspiracy set forth in the counterclaims. Since the assignment to the corporation was made under the Transfer Agreement, in knowing disregard of the provisions of §98 of the Partnership Law, that assignment is linked to Persky's false opinion letter, and to the $500,000 "forgiveness of indebtedness" by which the General Partners were induced to go along with the Transfer Agreement. To say that there is no logical connection and no linkage between the assignments of the churning claim on the one hand, and the counterclaims on the other, is to proclaim that up is down and that winter is summer.

Apparently recognizing the forlorn posture of their argument that there is no logical connection or linkage between the complaint and the counterclaims, the Finley,

Kumble answering brief has resorted to a secondary line of argument, namely that these connections and linkages do not count because they are related to defenses against the churning claim, and are not part of the churning claim itself (Finley, Kumble answering brief, p. 6) This argument is doubly fallacious.

First, Finley, Kumble's attorneys cannot be serious in arguing that plaintiff's allegation of title to the Buckley churning claim, whether acquired by assignment or otherwise, is not part of plaintiff's cause of action. To prove plaintiff's title is an affirmative element of the plaintiff's case. The denial of title is not an affirmative defense, and would not have to be raised as such.

Even more important, it is clearly fallacious to argue that defensive matter cannot provide the necessary nexus between the complaint and counterclaim. The purpose of the doctrine of ancillary jurisdiction is to permit related matters to be tried together, at one time, in order to avoid confusion and duplication of issues and proof. The factual issues pertaining to an affirmative defense must be tried in full whether or not counterclaims are asserted. If the issues contained in an affirmative defense are also embodied in a counterclaim, then the practical purpose of the doctrine of ancillary jurisdiction requires that the claim and counterclaim be tried together. The functional need for a one-trial disposition is exactly the same whether material common to the main cause and to the counterclaim arises out of plaintiff's

claim, a simple defense, or an affirmative defense.

A leading case is precisely in point to demolish both aspects of Appellants' argument, namely (1) that the assignment of the claim to plaintiff is not significant, and (2) that defensive issues common to the complaint and counterclaim do not provide a basis for ancillary jurisdiction. In Lesnik v. Public Industrial Corporation, 144 F. 2d 968 (2nd Cir. 1944) this Court overruled a District Court decision denying ancillary jurisdiction in circumstances parallel to the instant case. The plaintiff in Lesnik sued as holder of a note issued to another in January 1938. The counterclaim alleged that Lesnik took an assignment of the note in 1942 and instituted the action on it as part of a conspiracy against the defendant. Other members of the alleged conspiracy were brought in as additional defendants on the counterclaim. Judge Clark's opinion, citing Moore v. New York Cotton Exchange, supra, stressed the assignment and the conspiracy.

> "Under this view the counterclaims here may be viewed as arising out of the occurrence, and surely out of the transaction, by which Lesnik took the note upon which his complaint was based. Except for this, of course, and, indeed, as to outsiders who may have held the note, there would be no such interrelationship of the alleged conspiracy to the note to require its pleading in this action; but here the case is otherwise, since Lesnik took title to the note only as a step and a part in execution of the alleged conspiracy. Hence proof of the conspiracy bears directly upon Lesnik's allegation of due and proper assignment of the note to him and should be here tried, to avoid multiplicity of suits and secure economy of judicial action. The compulsory counterclaim device is, of course, only a means of bringing all logically related claims into a single litigation, through the penalty of precluding the later assertion of omitted claims." (144 F. 2d 968, 975)

The instant case contains both linkages recognized in Lesnik as creating ancillary jurisdiction: (1) the fact that the action was brought as part of the conspiracy, and (2) the fact that the cause of action was assigned as part of the conspiracy alleged in the counterclaims.

Lesnik is a leading authority, which has been cited dozens of times on the question of ancillary jurisdiction. One of Lesnik's progeny was United Artists Corp. v. Masterpiece Productions, 221 F.2d 213 (2d Cir. 1955), discussed in our main brief. It is noteworthy that in United Artists, as in Lesnik, the logical relationship found by the Court arose out of facts which were alleged defensively and also as part of the counterclaims.

As we showed in our main brief (p. 56), in United Artists one of the important connecting links between the claim and counterclaim was the assertion that Messrs. Benjamin, Krim and Peyser, the persons in control of the plaintiff, had some years earlier acted as lawyers for the defendants and had advised defendants that they owned the rights in question. These facts constituted both part of the counterclaim and the affirmative defense of estoppel.

The Finley, Kumble answering brief (p. 8) attempts to distinguish the United Artists case by misdescribing it. Their erroneous description of the case, and their argument that defensive material cannot supply the logical connection needed for ancillary jurisdiction, are both refuted by the following quotation from this Court's decision:

> "Here, the television rights at stake depended upon a number of considerations of which the interpretation of a prior contract -- stressed by the district court -- was only one. Defendants interposed a number of affirmative defenses, including that of estoppel. The plea of estoppel alleged that the additional defendants Benjamin, Krim and Peyser, now in control of the plaintiff corporation, had at one time acted as counsel for defendants in the acquisition of the very rights here at issue. The counterclaim is related to this estoppel argument, since it charges that Benjamin, Krim and Peyser conspired to deprive defendants of their rights in order to cement their own position in control of the plaintiff corporation. This lawsuit was alleged to be one of a series of harassing maneuvers designed to interfere with defendants' proper exploitation of rights acquired on the advice of the additional defendants. We think that these pleadings disclose a sufficient logical relationship so that, in the interest of avoiding circuity and multiplicity of action, the counterclaim should be considered compulsory under the authorities cited above." (221 F.2d 213, 216, emphasis added)

It is noteworthy that in the instant case, also, the defendants Gross, Bleich and Donoghue pleaded the breaches of fiduciary duties by way of estoppel as well as by way of counterclaim. (Amended Answer ¶48, P43).

Finley, Kumble has only cited one case in support of its argument that defensive issues cannot constitute the linkage necessary for ancillary jurisdiction: Agostine v. Sidcon Corp., 69 F.R.D. 437 (E.D. Pa., 1975). There is nothing in Agostine which supports the argument for which Finley, Kumble's attorneys advance it. In Agostine, the plaintiff brought an action based upon a claim that defendant violated the Federal Truth In Lending Act. The defendant pleaded a counterclaim based on the defaulted loan. The Agostine case was completely lacking in any assertion of an

affirmative defense or any other kind of a defense as a claimed link between the complaint and the counterclaim.* The Agostine case, therefore, has no relevance to the proposition of law for which Finley, Kumble cites it.

Thus, neither precedent nor reason support the argument that Judges Ward and Owen were in error in recognizing ancillary jurisdiction over the First, Second and Fourth Counterclaims. Such jurisdiction comprehends that portion of the Fourth Counterclaim which pleads destruction of the Rafkind employment as a step in the conspiracy.

B. Pendent jurisdiction, in addition to ancillary jurisdiction, exists with regard to the counterclaims which plead destruction of the Rafkind & Co. employment

In our main brief (pp. 99-102) we showed that the Eighth Counterclaim, which states the facts regarding the destruction of the Rafkind employment as wrongful under State law, including State anti-trust law, should be regarded as pendent to the Ninth Counterclaim, which pleads the identical facts as a Sherman Act violation. Pendent jurisdiction has long been recognized to exist with regard to a State claim which is identical as to fact with a parallel claim under Federal law. Our adversaries seem to argue, however, that the doctrine

* The stated basis of the decision was that plaintiff's entitlement to damages under the Truth in Lending Act would not excuse or diminish his liability on the loan.

of pendent jurisdiction applies only to claims set forth by the plaintiff in a complaint, and not to an identically parallel claim when set forth by defendants as a counterclaim.

At the outset, it is apparent that there is something disturbingly illogical about a rule which would make Federal subject-matter jurisdiction depend on whether the related Federal and State claims were presented in a complaint or were presented in a counterclaim. Rational jurisprudence does not seem to be served by the thought that pendent jurisdiction would exist over the State antitrust claim if Gross, Bleich and Donoghue had sued first and asserted the parallel Federal and State claims as plaintiffs, yet the same parallelism of claims will not support jurisdiction if one loses the race to the courthouse and the identical claims are set forth in an answer. It seems to us that such a rule would have no justification in terms of judicial economy or justice between the parties. All of the practical considerations which underlie the doctrine of pendent jurisdiction when applied to parallel causes set forth in a complaint, apply equally to the same parallel causes set forth in an answer as counterclaims.

The theoretical basis of pendent jurisdiction, as well as the practical basis, applies equally to causes set forth as counterclaims. The two leading cases are Hurn v. Oursler, 289 U.S. 238 (1938) and United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Both of these cases base pendent Federal jurisdiction over a parallel State claim on the concept that the claims under State and Federal law

present but one constitutional "case" or "cause of action". The key language of Hurn v. Oursler is:

> "Thus tested, the claims of infringement and of unfair competition averred in the present bill of complaint are not separate causes of action, but different grounds asserted in support of the same cause of action." (289 U. S. 238, 247)

This concept that the State and Federal claims constitute but one consitutional "cause of action" or "case" does not distinguish between such claims presented in a complaint and such claims presented in a counterclaim. Indeed,there is nothing in the concept which permits of such distinction.

Hurn v. Oursler was extended and liberalized by the Supreme Court's decision in United Mine Workers v. Gibbs, supra, which speaks of "one constitutional 'case'". Unfortunately, the key paragraph of the United Mine Workers' decision contains a reference to the "plaintiff's" claims which, taken out of context, is capable of causing confusion:

> "Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ,' U.S. Const., Art. III, §2, and the relationship between the claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction of the court. Levering & Garrigues Co. v. Morrin, 289 U.S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." (383 U.S. 715, 725, emphasis added)

We believe it is evident from the context that the underlined phrase was not used in an exclusionary sense to limit the application of the reasoning to claims set forth in a complaint. We believe the phrase was used merely because the case before the Court happened to involve a question of plaintiff's claims.

All of the Court's reasoning applies equally to claims asserted by defendants. We believe that if the Supreme Court had intended to limit its concept of a "constitutional case" to claims presented by plaintiffs, it would have indicated that limitation clearly and explained the reasons.

The following cases have held that the doctrine of pendent jurisdiction is applicable to parallel federal and state claims presented as counterclaims: Cutting Room Appliance Corp. v. Empire Cutting Machine Co., 186 F.2d 997 (2d Cir. 1951); M. L. Lee & Co. v. American Cardboard & Packaging Corp., 36 F.R.D. 27 (E.D. Pa. 1964); Denys Fisher (Spirograph) Ltd. v. Louis Marx & Co. of W. Va., Inc., 360 F. Supp. 956 (N.D.W.Va. 1969).

In Cutting Room Appliance Corp., supra, this Court said:

> "In Kaplan v. Helenhart Novelty Corp. 2 Cir., 182 F.2d 311, however, we had a situation like this, the only difference being that there the cause of action for unfair competition was joined to the complaint in a suit for a judgment declaring, among other things, the patent invalid. Since, as we have seen, a counterclaim will lie to raise the issues of infringement or invalidity, we can see no difference in the legal situation between the joinder of the non-federal claim with the federal in the complaint, as in that case, and in the counterclaim, as in this." (186 F.2d 997, 998. Emphasis added).

Beach v. KDI Corp., 490 F.2d 1312 (3d Cir. 1974), cited by our adversaries is not in point. In that case the Court held that a counterclaim could not be held pendent to a claim set forth in the complaint. (The District Court had held the counterclaim pendent to Count VII of the complaint). The Court of Appeals also held that there was no common nucleus of operative fact between the complaint and the counterclaim (490 F.2d 1312, 1319). Accordingly, Beach has no bearing on the question of whether pendent jurisdiction exists as to a state counterclaim which is parallel to a federal counterclaim.

Thus, we believe it clear that pendent jurisdiction exists with regard to the Eighth Counterclaim alleging that the destruction of Gross' Rafkind employment was illegal under state law, for the factual basis of this claim is identical to the federal Ninth Counterclaim. Such pendent jurisdiction will not be defeated by a holding (which we do not anticipate) that the federal antitrust law is not applicable to the instant situation. The rule is that so long as the federal claim is not entirely lacking in substance its dismissal will not defeat jurisdiction over the parallel state claim: Levering & Garrigues & Co. v. Morrin, 289 U.S. 103 (1933); Bell v. Hood, 327 U.S. 678 (1946); Taussig v. Wellington Fund, Inc., 313 F.2d 472, 475 (3d Cir. 1963).

Our adversaries also make the secondary argument that pendent jurisdiction rests on the discretion of the Court, and that Judge Ward's denial of pendent jurisdiction over the Eighth Counterclaim was a proper exercise of such discretion.

However, Judge Ward's opinion reveals that he did not exercise any discretion. He denied jurisdiction as to the Eighth Counterclaim under the erroneous belief that there could be no pendent jurisdiction of a Counterclaim (P448, 449).

CONCLUSION

Accordingly, we believe, as stated in our main brief, that this Court should:

(1) Dismiss the appeals of plaintiff and additional defendants on counterclaims.

(2) Remand the matter to Juge Owen to assess damages on the Record with regard to the wrongful destruction of Gross' employment with Rafkind, as is demanded by the cross-appeal.

(3) Reverse the dismissal as to additional defendant Berkowitz.

Dated: New York, New York
April 29, 1977

Respectfully Submitted,

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STATE OF NEW YORK)
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JULIO VALLEJO, JR., being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 703 REMSEN AVE. BROOKLYN, NYC.

That on the 29th day of APRIL, 1977, deponent personally served the within REPLY BRIEF OF DEFENDANTS--APPELLEES--CROSS-APPELLANTS upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

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Julio Vallejo Jr

Sworn to before me this

29th day of APRIL, 19 77.

Michael DeSantis

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